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No. 94-156

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NICHOLAS A. DIGIRLAMO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

-and-

CHARLES M. CARBERRY, ESQ.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT CHARLES M. CARBERRY IN OPPOSITION

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BRIEF OF RESPONDENT CHARLES M. CARBERRY IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion (Pet. App. A1-A16) is reported at 19 F.3d 816. The district court's opinion (Pet. App. C1-C23) is reported at 824 F. Supp. 410.

JURISDICTION

The court of appeals denied petitioner's petition for rehearing on April 22, 1994. The petition for a writ of certiorari was filed on July 21, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

1. In 1988, the United States filed a civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988 & Supp. II 1990), against the International Brotherhood of Teamsters (IBT) and members of the IBT General Executive Board. (Pet. App. A2.) The complaint alleged that the IBT had long been under the control of organized crime, and sought equitable relief to rid the union of such control. *See United States v. International Bhd. of Teamsters*, 905 F.2d 610, 612-13 (2d Cir. 1990). In 1989, the parties agreed to settle the action and stipulated to the entry of a consent decree incorporating the terms of their settlement agreement. (Pet. App. A3; C.A. App. A1-A28; text of Consent Decree.)

The principal goal of the settlement and consent decree is to wrest the union from the influence of organized crime and establish a new system of rank-and-file election of IBT officers. (Consent Decree 2); *United States v. International Bhd. of Teamsters*, 931 F.2d 177, 180-81 (2d Cir. 1991); *United States v. International Bhd. of Teamsters*, 764 F. Supp. 787, 788 (S.D.N.Y.), *aff'd mem.*, 940 F.2d 648 (2d Cir.), *cert. denied*, 112 S.Ct. 76 (1991). The Consent Decree also provides for the appointment of an Investigations Officer to investigate corruption and misconduct within the union and an Independent Administrator whose duties include hearing and deciding union disciplinary charges. (Pet. App. A3.) The authority of the Independent Administrator and Investigations Officer expired in 1992, with certain limited exceptions including the authority to resolve to completion and decide all charges already filed by that time by the Investigations Officer. (Consent Decree 3.)

Under the consent decree, a party facing a disciplinary charge brought by the Investigations Officer has the right to notice and a hearing before the Independent Administrator. (Consent Decree 9.) The hearings are conducted

in the same manner as labor arbitration proceedings. (*Id.*) The Administrator's decision is then subject to review by the district court. (*Id.* at 10.) The decree states that in reviewing such decisions, the district court shall apply the same standard of review a federal court applies to administrative decisions under the Administrative Procedure Act. (*Id.* at 25.)

The consent decree enjoins any union member from knowingly associating with "any member or associate of the Colombo Organized Crime Family of La Cosa Nostra, the Genovese Organized Crime Family of La Cosa Nostra, the Gambino Organized Crime Family of La Cosa Nostra, the Lucchese Organized Crime Family of La Cosa Nostra, the Bonnano Organized Crime Family of La Cosa Nostra [and] any other Organized Crime Families of La Cosa Nostra or any other criminal group." (Consent Decree 6.) The consent decree specifically provides that "[t]he IBT Constitution shall be deemed and hereby is amended to incorporate and conform with all of the terms set forth in this order." (Consent Decree 5.)

2. The Investigations Officer filed disciplinary charges against petitioner on May 14, 1992. The charges alleged that petitioner had violated Article II, § 2(a) of the IBT Constitution, which has long required every member to conduct himself in a manner which will not "bring reproach upon the union," by "knowingly associat[ing] with members of La Cosa Nostra ("LCN"), including, but not limited to, Charles Moretina, James J. Moretina, Peter Joseph Simone, and Frank Anthony Tousa." [1]

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[1] The Investigations Officer also charged petitioner with knowingly associating with LCN associates Nicholas Joseph LaBruzzo and John Anthony Costanza. However, the Independent Administrator found that, on the record before him, there was not sufficient evidence to establish the LCN ties of LaBruzzo and Costanza. (Pet. App. D12.) The charge against petitioner in its entirety provides:

> While a member and employee of IBT Local 41, you brought reproach upon the IBT and violated your membership oath in

Petitioner sought a hearing before the Independent Administrator. Before the hearing, the Investigations Officer provided petitioner with all the evidence that would be offered against him at the hearing. (Pet. App. C17.) In a written decision dated January 20, 1993, the Independent Administrator found the charge proved after a hearing. Distinguishing contacts which are "incidental or fleeting" from those proved at the hearing, the Administrator found it "clear" that petitioner "has purposefully associated with C. Moretina, J. Moretina, Simone and Tousa." (Pet. App. D13.) Evidence of petitioner's knowing association with LCN members included petitioner's own admissions, his gambling conviction, results of physical and electronic surveillance, and corroborated statements of reliable informants. (Pet. App. D13-D22.) Based on the hearing record, the Independent Administrator found that "[a]n individual like [petitioner], who counts among his associates members of organized crime, has no place in the IBT" (Pet. App. A22), and, accordingly, expelled petitioner from the IBT and prohibited him from drawing any funds from the IBT or its affiliates. (Pet. App. A23.)

3. The Independent Administrator's decision was submitted to the district court for review. The district court determined that the sanction was both supported by the evidence and consistent with the IBT Constitution. (Pet. App. C1-C23.) The district court also rejected petitioner's contentions—raised for the first time in that court—

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violation of Article II, Section 2(a) and Article XIX, Section 7(b)(1) and (2) of the IBT Constitution, *to wit*:

From 1978 to the present, while a member and employee of IBT Local 41, you knowingly associated with members of La Cosa Nostra ("LCN"), including, but not limited to, Charles Moretina, James J. Moretina, Peter Joseph Simone, and Frank Anthony Tousa. From 1978 to the present, you also knowingly associated with associates of LCN including, but not limited to, John Anthony Costanza and Nicholas Joseph LaBruzzo. (Pet. App. A3-A4 at n.1.)

that the disciplinary charges filed against him, as well as the provisions of the IBT constitution prohibiting conduct bringing "reproach" upon the union, lacked the specificity required by the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401-531 (1988). Quoting the court of appeals' decision in *United States v. International Brotherhood of Teamsters*, 941 F.2d 1292, 1298 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1161 (1992), the district court concluded that, " 'because it should have been clear . . . that associating with known members of organized crime would bring reproach upon the IBT, sanctioning [petitioner] for these activities is not constitutionally infirm.' " (Pet. App. C16-C17.)

4. The United States Court of Appeals for the Second Circuit affirmed. The court rejected petitioner's contentions under the LMRDA, relying primarily on its holding in an earlier case that "IBT members were aware that association with organized crime figures was prohibited even *before* the Consent Decree added the provision to the union constitution" and that the decree " 'simply made explicit the longstanding goal of the IBT to be free of corruption.' " (Pet. App. A14 (quoting *United States v. International Bhd. of Teamsters*, 941 F.2d at 1297).) The court further found that, even assuming "the existence of hypothetical situations in which the [constitutional] prohibitions would be considered vague," petitioner's "is not such a case" as " 'it should have been clear to [union members disciplined for associating with LCN] that associating with known members of organized crime would bring reproach upon the IBT.' " (Pet. App. A14 (quoting *United States v. International Bhd. of Teamsters*, 941 F.2d at 1298).)

The court also rejected petitioner's argument that he was denied a reasonable amount of time to prepare for his disciplinary hearing, finding that petitioner did not raise the argument of insufficient time to prepare at the

hearing and did not move for an adjournment or continuation of the hearing in order to prepare further. (Pet. App. A15.) The court noted that the Administrator offered petitioner the "usual opportunity" to file post-hearing submissions. (Pet. App. A15.)

REASONS FOR DENYING THE WRIT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Because the issues presented by petitioner are fact specific and the authority of the Independent Administrator and Investigations Officer has, with limited exceptions, already expired, his case presents no issue of continuing importance warranting further review by this Court.

I. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *BOILERMAKERS v. HARDEMAN*, 401 U.S. 233 (1971).

The Consent Decree provides that a union member charged with a disciplinary violation must be served with "written specific charges." (C.A. App. 9.) That provision directly parallels the LMRDA, 29 U.S.C. § 411(a)(5)(A).[2] The courts have noted that the degree of specificity required to meet the statutory standard is fact specific and "will, of necessity, vary from case to case,"

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[2] Section 101(a)(5) of the LMRDA, 29 U.S.C. § 411(a)(5), provides:

> Safeguards against improper disciplinary action. — No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Gleason v. Chain Service Restaurant, 300 F. Supp. 1241, 1251 (S.D.N.Y. 1969), *aff'd*, 422 F.2d 342 (2d Cir. 1970), and have uniformly held that, under the LMRDA, union disciplinary charges need not meet the standards of a criminal indictment or even civil pleadings. *See Berg v. Watson*, 417 F. Supp. 806, 810 (S.D.N.Y. 1976) ("the strict requirements of a criminal prosecution need not be complied with"); *Jacques v. Local 1418, Int'l Longshoremen's Ass'n*, 246 F. Supp. 857, 859 (E.D. La. 1965) ("We do not expect union officials to frame their charges and specifications technically as formal legal pleadings"), *aff'd*, 404 F.2d 703 (5th Cir. 1967). "Union charges need only 'be so drafted as to inform a member with reasonable particularity of the details of the charges.'" *Eisman v. Baltimore Regional Joint Bd.* 352 F. Supp. 429, 435 (D. Md. 1972), *aff'd*, 496 F.2d 1313 (4th Cir. 1974). Accordingly, the principal question concerning the specificity of a charge is whether it is "specific enough to inform the accused member of the offense that he has allegedly committed." *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 245 (1971) (internal quotations omitted).

The Second Circuit correctly found the charge in this case contained the specificity required by the LMRDA. The charges informed petitioner that he had been charged with violating of Article II, § 2(a) and Article XIX, §§ 7(b)(1) and (2) of the IBT Constitution by "knowingly associat[ing] with members of La Costa Nostra ("LCN"), including, but not limited to, Charles Moretina, James J. Moretina, Peter Joseph Simone, and Frank Anthony Tousa." Petitioner was also given the evidence against him in advance of the hearing before the Independent Administrator. He cannot therefore credibly claim that he was unaware of the offense that he had been charged with committing or that he "had been misled or otherwise prejudiced in the presentation of his defense." *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. at 245.

Nor can petitioner demonstrate, as he claims, that "the court of appeals' holding, that the charge complies with the LMRDA requirement of specificity and fair hearing, conflicts with decisions of this Court and other circuits." (Pet. 10.) *International Brotherhood of Boilermakers v. Hardeman*—the only purportedly conflicting case in this Court that petitioner cites—reaffirmed a union member's right under the LMRDA to "written specific charges" and, consistent with the Second Circuit decision, held on the specific facts of that case that the union's charge was sufficiently specific to satisfy the LMRDA. 401 U.S. at 245. None of the remaining cases petitioner cites on the specificity requirement are circuit court decisions and, in any event, all are fact-specific applications of the LMRDA's requirements to the specific charges in those cases. *See Berg v. Watson*, 417 F. Supp. at 810 (notice specified that plaintiff "violated his oath of obligation on or about June 15, 1973 in that he refused to comply with an order given by me in my capacity as a Business Agent"); *Eisman v. Baltimore Regional Joint Bd.*, 352 F. Supp. at 435 (charge that union member had acted in an unbecoming manner at October 23 meeting insufficient where hearing focused on member's activities on other dates)[3]; *Gleason v. Chain Service Restaurant*, 300 F. Supp. at 1251 (reviewing nine charges); *Jacques v. Local 1418, Int'l Longshoremen's Ass'n*, 246 F. Supp. at 859 (specifications—including a charge that accused "and his public record is not exemplary"—had no "reference to any particular time, place or circumstances and acts, as required by the Union's By-laws"). Furthermore, in none of the cases was there any indication, as here, that the accused had received the evidence that would be offered against him in advance of the hearing. Accordingly, even if these remaining decisions were from courts of appeals,

[3] Contrary to petitioner's assertion, the court "assum[ed] that the charges were sufficient to give appropriate notice of allegedly improper conduct by plaintiff at the meeting of October 23 . . . ." 352 F. Supp. at 436.

they are distinguishable on their facts and do not conflict with the decision of the Second Circuit.

II. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONER'S CLAIM THAT THE IBT CONSTITUTION IS VAGUE.

Citing *Semancik v. United Mine Workers District #5*, 466 F.2d 144, 157 (3d Cir. 1972), and several decisions interpreting the term "association" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1988 & Supp. II 1990), petitioner contends that provisions of the IBT constitution which prohibit "knowingly associating" with any member or associate of an organized crime group and conduct bringing "reproach" upon the Union are vague and therefore failed to give him adequate notice of the conduct that was prohibited. Petitioner does not dispute the court of appeals' finding that "IBT members were aware that association with organized crime figures was prohibited even *before* the Consent Decree added the provision to the union constitution" and that "[t]he new provision 'simply made explicit the longstanding goal of the IBT to be free of corruption.'" (Pet. App. A15; *see* Pet. 23 (admitting that "purpose of the Consent Decree was to eliminate 'corruption of any part of the IBT'").) Instead, he mischaracterizes the evidence concerning his association with known LCN members—he allegedly had merely "unpublicized legitimate professional or familial associations unrelated to union affairs and involving no misconduct on his part"—and asserts that, because this evidence was found sufficient to satisfy the prohibitions in the union constitution, the constitution must be vague. (Pet. 21-24.)

Petitioner's vagueness claim plainly depends on acceptance of his specific version of the facts, which has been considered and rejected by the court of appeals, the district court and the Independent Administrator. After rejecting petitioner's contention that his associations with

certain LCN members constituted only "innocent familial or professional associations," the court of appeals added, "for purposes of portraying a complete picture, that some evidence further suggested that [petitioner] not only associated with organized crime figures, but that he may also have served as an instrument of LCN influence on Local 41." (Pet. App. A11-A13.) The record evidence, moreover, is replete with indications that petitioner knew or should have known that his conduct brought reproach upon the union.[4] Accordingly, the court of appeals correctly found that "[petitioner's] contacts with LCN members clearly constituted conscious choices" that cannot be explained away as innocent familial or business relationships. (Pet. App. A12.)

Furthermore, neither *Semancik* nor any of the cases petitioner cites interpreting the RICO statute conflicts with the Second Circuit decision. The prohibition in *Semancik* precluded any union member from "resorting to dishonest or questionable practices to secure the election or defeat of any candidate for district office" and, unlike the IBT provision, "put the members at their peril whenever they exercised their free speech rights." 466 F.2d at 147, 150. Similarly, the cases petitioner cites applying a different test of "association" under the RICO statute are also inapposite. (*See* Pet. 25-26 (citing *Reeves v. Ernst & Young*, 113 S.Ct. 1163 (1993); *University of Maryland v. Peat, Marwick and Main, Co.*, 996 F.2d 1534 (3d Cir. 1993); *United States v. Ricco-*

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[4] *E.g.*, C.A. App. 408-10 (petitioner took pains to conceal his connection with LCN figures); C.A. App. 229, 422 (petitioner denies during his deposition meeting with IBT organizer and C. Moretina at his residence, although physical surveillance places them there); C.A. App. 314, 315 (newspaper accounts indicating that petitioner's relationship to organized crime brought reproach upon the IBT). Indeed, petitioner himself recognized that, in 1991, after Peter Simone was identified in newspaper stories as an LCN member, "that's when I felt that . . . I'm possibly putting my job up at risk . . . ." (C.A.App.274.) Even then, petitioner did not end his relationship with Simone. (C.A. App. 277-78, 377.)

bene, 709 F.2d 214, 220-21 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983).) The test for association under RICO requires that the defendant have participated in the RICO enterprise's affairs. *E.g., Estee Lauder, Inc. v. Harco Graphics, Inc.*, 621 F. Supp. 689, 691 (S.D.N.Y. 1984). To prove an impermissible association in violation of the IBT Constitution, the Investigations Officers must show that the respondent had purposeful contacts with members of organized crime which were neither fleeting nor incidental. *E.g., United States v. International Bhd. of Teamsters (Adelstein)*, 998 F.2d 120, 125 (2d Cir. 1993). The "association" under RICO is, therefore, not analogous to the "association" under the IBT Constitution. Not surprisingly, petitioner does not cite any case that accepts his contention that the standard for "association" under RICO applies to "association" in violation of the IBT Constitution.

In sum, petitioner cannot demonstrate that the decision of the court of appeals conflicts with any ruling of this Court or of any other court of appeals. Moreover, the issues presented by petitioner are unique to the temporary arrangement established by the 1989 consent decree between the IBT and the United States. Under the terms of the decree, the authority of the Independent Administrator and the Investigations Officers expired in 1992. (Consent Decree 3.) This case thus presents no issue of continuing importance warranting further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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